89-224

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

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October Term, 1989

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Isabel Cannedy, Wayne Cannedy, Ronald Cannedy, John Cannedy, Janis Fountaine and Karla Figuerido,

Petitioners,

v.

Pacific Gas & Electric Company,

Respondent

---

On Writ of Certiorari
to the Supreme Court of the Unites States

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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## QUESTIONS PRESENTED FOR REVIEW

1) Whether the affirming of the summary adjudication of fire causation issues for Pacific Gas & Electric Company in this matter -- when the motion was supported solely by conclusory opinion declarations of the company's employees/agents -- violated the Due Process rights of Petitioners.

2) Whether the affirming of the summary adjudication of fire causation issues for Pacific Gas & Electric Company in this matter constituted clear and patent error.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a writ of certiorari issue to review

the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four filed on February 3, 1989. Petition for Review was denied by the Supreme Court of the State of California on April 19, 1989.

## OPINIONS BELOW

The opinion of the California court of Appeal is not reported. It is printed in Appendix A infra., at page A-1. The order denying review by the California Supreme Court is printed in Appendix B, infra, at page A-14. The Judgment on the Pleadings and Dismissal of the Superior Court's order granting summary Adjudication of Issues is printed in Appendix D infra, at page A-17.

## JURISDICTION

The judgment of the California Court of Appeal (Appendix A) was entered on February 3, 1989. A timely petition for review was denied on April 20, 1989 (Appendix B, infra., at page A-14). The jurisdic-

tion of the Supreme Court is invoked pursuant to 28 U.S.C. 1257(3).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves Section 437c of the California Code of Civil Procedure, which provides as follows:

> Chapter 5. Summary Judgment
>
> Section 437c. Grounds for and effect of summary judgment; procedure on motion
>
> (a) Any party may move for summary judgment in any action or proceeding if it contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days have elapsed since the general appearance in that action or proceeding of each party against whom the motion is directed or at such earlier time after the general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the of place address is outside the State of California but within the United States, and 20 days

if the place of address is outside the United States. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient grounds for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed indicating whether the opposing party agrees or disagrees that those facts are undisputed. The

statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than 5 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made either in writing or orally at the hearing shall be deemed waived. The provisions of Section 1005 and the provisions of subdivision (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objection have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on

inferences reasonable deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters state therein.

(e) If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's affirmation thereof.

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised a defense is conceded, the court shall, by order, specify that those issues are without substantial

controversy. Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a material, triable controversy, and shall specifically refer to the evidence which establishes a triable issue of act regarding each of those issues. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

(g) Upon the denial of a motion for summary judgment on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reason stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other

order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion of summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(k) In actions which arise out of any injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(l) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 10 days after service upon him or her of a written notice of entry of the order, or within such further time not exceeding 20 days as the trial court may for good cause

allow, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the period within which to file the petition shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States.

(m) Nothing in this action shall be construed to extend the period for trial provided by Section 1170.5.

(n) The provisions of subdivisions (a) and (b) shall not apply to actions brought pursuant to chapter 4 (commencing with Section 1159) of Title 3 of Part 3. (emphasis added)

## STATEMENT OF THE CASE

Petitioners herein are Isabel Cannedy and her five children, Wayne, Ronald and John Cannedy, and Janis Fountaine, Karla Figuerido. They are private citizens whose lives were changed completely and forever on January 1, 1982, when, immediately after PG&E restored power to the area following an outage, a fire broke out in the mobile home Petitioner Isabel Cannedy shared with her husband, Ardell Cannedy. The fire

gutted the trailer and killed Mr. Cannedy. The county Fire Department conducted only a cursory investigation, and permitted PG&E to conduct the full investigation of the fire; the resulting PG&E report exonerated PG&E of all blame. During the investigation, critical evidence regarding the cause of the fire -- such as the service conductors -- was destroyed or discarded.

Petitioners brought an action against PG&E, charging that the fire occurred because of an electric surge or similar phenomena during the restoration of electricity to the trailer and that PG&E had fraudulently covered-up their fault. After refusing to produce evidence and delaying discovery in every possible way, PG&E brought a motion for summary adjudication claiming the Petitioners had no facts supporting their claim.

PG&E supported its motion only by "expert" declarations: declarations by their own agents and employees giving their opinions and conclusions about the cause of the fire. Contrary to the dictates of the pertinent state statute (California Code of Civil Procedure, Section 427(c)), none of the persons giving declarations had any personal knowledge of any facts of the case: all contained "expert" opinion testimony.

The Superior Court granted the motion for summary adjudication on the issue of causation on September 24, 1987. Based on this ruling, Judgment on the Pleadings and Dismissal was entered in the case on December 14, 1987 by the same court. The Court of Appeal upheld the judgment on appeal (Appendix A, at page A-1) and the Supreme Court of California denied the Petition for Review on April 20, 1989 (Appendix B).

PG&E's investigation of the fire.

On January 1, 1982, electrical power was interrupted to the mobile home of Isabel and Ardell Cannedy for a period of four and one-half hours. Petitioner Isabel Cannedy went to her mother's trailer next door while Mr. Cannedy stayed in the trailer and napped. Immediately after power was restored, Petitioner Isabel Cannedy returned home to find her home engulfed in flames. Mr. Cannedy was killed in the blaze, which completely destroyed the mobile home and all of their possessions.

Normal procedures required the county fire department to conduct its own thorough investigation of every major fire and to determine its cause. However, in the instant case, the fire department did little more than arrive on the scene. Instead, it permitted PG&E to conduct the investigation by itself, which resulted in a complete exoneration of PG&E. Petitioners

continued to assert that the fire was caused by an electric surge or similar over-supply of power to the trailer when PG&E resumed their electric service.

As PG&E conducted the investigation, much of the information and evidence concerning the cause of the fire came into the hands of its employees and agents, and remained in their sole possession. When Petitioners brought suit against the company, they learned that the most important pieces of evidence needed to establish whether an electrical surge caused the fire - the service conductors - had been taken down by PG&E and had either been discarded (as PG&E claimed) or were otherwise unavailable to her.

Moreover, PG&E refused to expedite discovery and, indeed, did much to delay the transfer of documents and evidence to Petitioners.

PG&E's motion for summary adjudication and Petitioner's motion for reconsideration.

In July, 1987, PG&E noticed a motion for summary adjudication of issues, asking for a ruling that would basically determine causation. It sought to adjudicate the following two issues: whether a surge of electrical imbalance occurred on the day of the fire in the Cannedy residence; and whether the fire was caused by electricity.

However, PG&E supported its motion entirely with declarations from experts who offered opinions as to the cause of the fire. Petitioners filed evidentiary objections to the declarations as opinion declarations are not permissible under California Code of Civil Procedure Section 437(c).

In addition, Petitioners pointed out to the court that PG&E had not yet complied with long outstanding discovery orders regarding evidence essential to their case.

The judge continued the motion for summary adjudication until September 23 to allow discovery to be completed, ordered Petitioners to file their response to the motion by September 9, and suggested that if discovery were not forthcoming by that date, the hearing could be further continued.

In fact, PG&E did not comply with all of the outstanding discovery were not forthcoming by that date, the hearing could be further continued.

In fact, PG&E did not comply with all of the outstanding discovery orders and requests by September 9. Moreover, the transcription of PG&E's experts' depositions was not completed by that date either. These facts made it impossible for Petitioners' experts to review all pertinent and necessary evidence on the issue of causation, which made it impossible for Petitioners' response to be

completed by the date set.

Despite these circumstances, the superior court judge heard the motion over Petitioners' objections. Upon notice that the court had granted the motion for summary adjudication, Petitioners promptly filed a motion for reconsideration, appending their own expert declarations -- at long last available as discovery was completed -- which contradicted PG&E's expert declarations.

The Declarations

PG&E's motion for summary adjudication was supported by opinion affidavits from two men: Raymond Bachtelle and Rodney Baishiki. The latter had been employed by PG&E for twenty-two years prior to the Cannedy fire. His declaration basically restated the points sought to be adjudicated (that there was not electrical surge and that the fire was not caused by

electricity) and declared them to be his opinions.

Raymond Bachtelle, a long-term consultant for PG&E, also concludes that the fire was not electrical in origin. He asserted that he interviewed family members, Fire Department personnel, and other fire experts and looked over the scene. From this input he made certain assumptions that he opined were more consistent with a propane fire than with an electrical fire. He baldly concluded that no defect or overvoltage occurred.

In their motion for reconsideration, Petitioners presented the opinions of their experts, Ron Hall and electrical engineer Allan Jones. Jones states that it is impossible for PG&E to ascertain whether a defect or electrical imbalance occurred without examining the service conductors -- which PG&E claimed were destroyed.

Ron Hall, a fire cause consultant, concluded that the probable cause of the fire was electric. His process of determining the probable cause of the fire was to identify and discuss all of the potential causes of the fire, and, by a process of elimination, to arrive at the likely cause. He was able to eliminate every other cause -- including propane -- except electricity.

The Superior Court ruling.

The Superior Court judge effectively granted reconsideration but affirmed the grant of summary adjudication. Petitioner petitioned the court of Appeal for a Writ on the grounds that the judge's ruling was an abuse of discretion. The Petition was denied.

The action came on for jury trial on November 18, 1987. PG&E filed and was granted motions in limine regarding

evidence as to a power surge or an electrically-caused fire. The judge ruled that these motions effectively precluded all evidence on causation and granted a motion on the pleadings and a motion to dismiss. Theses were entered on December 14, 1987.

The Appeal.

On January 6, 1988, Petitioners noticed an appeal. They asserted that the expert declarations could not be used to support a summary adjudication motion; that their own expert declarations, along with other facts and inferences presented, were sufficient to withstand summary adjudication; and that, in any event, the fraud cause of action should have been allowed to go to the jury.

After full briefing, the Court of Appeal affirmed the decision below. It stated that the lower court effectively

granted the motion for reconsideration and then reaffirmed the grant of summary adjudication. It ruled, however, that it would have been within the lower court's discretion to deny the motion for reconsideration, stating_ the Petitioners had not explained their failure to produce their expert declarations earlier. The Court of Appeal concluded that "our crowded courts are not required to reopen issues previously decided to address matter that could have been raised in the first instance." (Appendix A, at page A-12.)

Petitioners sought review in the Supreme Court of the State of California, which petition was denied by order dated April 18, 1989 (Appendix B, at page A-14).

## REASONS FOR GRANTING WRIT

I The case raises an important and unresolved issue of when state summary adjudication procedures improperly impinge upon the constitutional right to a fair trial.

Petitioners assert that the actions taken by the superior court, as affirmed by the decision in the Court of Appeal of the State of California, First Appellate District, resulted in denying them their constitutional right to a fair trial.

The Due Process Clause of the Fourth Amendment of the federal constitution requires that every party litigant in this nation be provided with a fair opportunity to adjudicate their claims. While summary proceedings that resolve actions are permissible, the inequitable and arbitrary elimination of a meritorious cause of action is repugnant to the constitution. Louisville & N.R. Co. v. Schmidt (1900) 177

U.S. 230.

The Court has held that an erroneous decision of a state court does not deprive a party of property without due process of law if that party has had a full opportunity to litigate his claims in the regular course of judicial proceedings. Tidal Oil Co. v. Flanagan (1924) U.S. 444; Central Land Co. v. Laidley (1895) 159 U.S. 103. However, when a party's opportunity to present his case has been cut off by state procedural rulings, his due process rights may be impermissibly infringed. Atkins v. United States (1977) 556 F.2d 1028, cert. den. 434 U.S. 1009. And this is true whether the party's rights have been truncated by impermissible state procedure or by a state court ruling which overrules a consistent line of procedural decisions with retroactive effect with the result of denying a litigant a hearing in a pending case. Bouie v. Columbia (1964) 378 U.S.

347.

In the present matter, Petitioners do not claim that they presented evidence proving that PG&E caused the fire that killed their father and destroyed their home; such factual issues are matters for resolution in lower courts. Rather, they assert that the improper application of summary adjudication procedures resulted in a complete denial of their right to litigate their causes of action against PG&E.

This Court has never addressed the critical issue of the points at which state summary adjudication procedures impermissibly impinge upon constitutionally protected rights. Petitioners respectfully request that this Court provide needed guidance in this sensitive area to preclude further erosion of Due Process guidelines and to ensure uniformity of decisions.

II The decision below was clearly and patently erroneous.

Moreover, this Writ should be granted as to the decision of the Court of Appeal is clearly and patently erroneous. Almost without exception, California case law interprets California Code of Civil Procedure section 437(c) as forbidding a summary adjudication motion being supported by rank opinion testimony. See, for example, Fuller v. Goodyear Time and Rubber Company (1970) 7 Cal App 3d 690; Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal App 3d 1140; Ahrens v. Superior Court (1988) 197 Cal App 3d 1134; Bowden r. Robinson (1977) 67 Cal App 3d 795; and Carmona v. Division of Industrial Safety (1975) 13 Cal 3d 303.

In the present case, the unreasoned and unreasonable departure from that decisional law has served to completely deprive Petitioners of a trial of their

case on the merits. This result is patently erroneous and should be reviewed by this Court.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District.

Respectfully submitted,

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June 30, 1989

7-24E-89/cdc/mu

# A P P E N D I X  A

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IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ISABEL CANNEDY, et al.

Plaintiffs and Appellants,

vs.

PACIFIC GAS AND ELECTRIC COMPANY

Defendant and Respondent.

A041009

(San Francisco County) Super.Ct. 803059

Plaintiffs Isabel Cannedy, et al. (collectively, appellants), appeal from the judgment entered in favor of defendant Pacific Gas and Electric Company (respondent) in an action for damages arising from the death of Ardell Cannedy (Cannedy), appellants' decedent, in a mobile home fire in 1982. Appellants' case was dismissed after respondent's motion for summary adjudication was granted negating

allegations that respondent was responsible for starting the fire that claimed Cannedy's life. Appellants contend that the motion for summary adjudication was improperly granted and, alternatively, that their motion for reconsideration of the ruling was improperly denied. We affirm.

Electrical power to the mobile home of Cannedy and his wife was interrupted for about four and one-half hours on January 1, 1982. Mrs. Cannedy went to a nearby travel trailer during the power outage to keep warm as the Cannedy mobile home was heated by a liquid petroleum gas fired furnace. After the power had been restored, she returned to find her mobile home engulfed in flames. Cannedy perished in the fire.

Appellants' original complaint was filed in December of 1982, and a third amended complaint was filed in October of 1986. Respondent noticed its motion for summary adjudication of issues for July 22,

1987, asking for rulings that: "(1) there was no defect, electrical imbalance, current surge or overvoltage in that part of PG&E's system serving the Cannedy mobile home on January 1, 1982, when PG&E's electric service was restored; and, (2) the fire at the Cannedy mobile home was not caused by electricity."

Respondent's motion was supported inter alia by the declarations of Raymond Bachtelle and Rodney Baishiki. Bachtelle, an independent fire investigator who had investigated more than 1,000 fires and more than 50 fire-related deaths, was retained by respondent to investigate the Cannedy fire. Bachtelle examined the scene ten days after the fire occurred, crawling "all through the debris" and taking numerous photographs. He authored a written report dated February 4, 1982, in which he concluded that "the most probable cause of this fire was someone attempting to light

the furnace and that there was a build up of gas and when this ignited it ignited the chair in front of the furnace, which was the recliner chair, and that the fire spread from there." In his June, 1987, declaration, Bachtelle repeated his conclusion that "the most likely cause of this fire was a flashover of propane from that furnace."

Bachtelle declared that he found no evidence of an electrical surge or electrical problem, even though he had "checked all the way from the supply at the power pole through to the outlets within the mobile home." Bachtelle reviewed the deposition testimony of Stanislaus County Deputy Fire Warden Kenneth Moore, portions of which were also submitted in support of the motion for summary adjudication. Moore had investigated the scene on the day of the fire and he found no evidence to suggest that electricity was a possible

cause. Bachtelle interviewed family members and members of the fire department, who advised that the fire had spread too quickly, in Bachtelle's opinion, to be a fire of electrical origin.

During his investigation, Bachtelle observed that someone had inserted a piece of steel wire into the propane furnace. Cannedy's son told Bachtelle that the wire was twisted to hold a match to light the furnace, and that he had often seen his father light the furnace in that manner. Cannedy was found face down with burns over 100% of his body. He was lying on top of an unburned portion of carpet, and Bachtelle concluded that "the front part of his body did not burn while he was in that position." Accordingly, Bachtelle reported that "[i]t was the opinion of the fire fighters and would be my opinion that if Mr. Cannedy was burned on his face and the front of his body [it] would had to have

happened prior to his falling to the floor in the bedroom; that he could have been burned while attempting to light the furnace and attempted to escape to the back of the mobile home where he was found."

Respondent's other expert, Baishiki, is an electrical engineer and an employee of respondent. Based on a review of Bachtelle's 1982 report, witness statements and depositions, and respondent's electric records, Baishiki concluded that there was no defect, electrical imbalance, current surge or overvoltage in respondent's system when electrical power to the Cannedy mobile home was restored on the day of the fire. He further declared that "if there had been any irregularity in PG&E's electric service sufficient to damage household appliances or wiring, there would have been evidence of it in the materials I reviewed."

Although Code of Civil Procedure section 437c, subdivision (d)* states that declarations in connection with motions for summary adjudication are to be based on "personal knowledge," properly qualified experts may submit declarations based on expert opinion rather than personal knowledge. (See Evid. Code, Section 801.) We are satisfied that respondent's experts are properly qualified, that their declarations "set forth admissible evidence" for purposes of section 437c, and that their opinions on the issues presented for summary adjudication were conclusive absent competent opposition.

In June of 1987, shortly after respondent filed its motion for summary adjudication, appellants filed a memorandum of points and authorities to set the case

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* Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

for trial. It contains the following statement: "Further evidence of the Plaintiffs' diligent prosecution of this case may be seen from the fact that Plaintiffs have retained two expert witnesses who will testify as to the accepted methods for investigating and determining the cause of a fire and that this fire was ignited by a surge of electrical power negligently supplied by the Defendant." Despite that statement and the precedents indicating that the cause of a fire is a proper subject for expert opinion (see, e.g., People v. Sundlee (1977) 70 Cal App 3d 477), appellants did not file any expert declarations prior to the July 22, 1987, hearing on the motion for summary adjudication. Instead, they relied solely on a declaration of their attorney, Mr. Cain.

Attached to Cain's declaration were excepts from the depositions of Bachtelle,

Moore and two local fire department officials, Timothy Hubble and Russell Richards. None of this proffered testimony established a "material, triable controversy" with respect to either of the issues presented in respondent's motion. (Section 437c, subd. (f).) Richards testified that he had not tried to determine the cause of the fire and had "no opinion" on whether it was caused by electricity. Moore testified that the fire originated in the area of the furnace and spread too rapidly to be caused by electricity. Moore indicated that "the fellow that stopped to help Mrs. Cannedy ... [stated that] when [the power] came back on, it blew his fuses out," and Hubble testified that "somebody" at the scene of the fire "told us that there had been a power surge or some kind of power outage," but neither of those hearsay statements was sufficient to controvert respondent's

expert declarations. Bachtelle's transcript was apparently submitted simply to show that respondent's counsel instructed him not to answer some of the questions posed during his first deposition.

At the July 22, 1987, hearing, appellants sought a continuance to complete discovery before the motion was decided. Appellants' counsel advised the court that they needed to study answers to pending interrogatories seeking "information as to other claims involving similar incidents," and to take the depositions of "PG&E employees." A 60-day continuance was granted. Insofar as it appears from the record, the only additional discovery undertaken in the interim was as follows: a second deposition of Bachtelle was taken on September 1; appellants were given color photographs Bachtelle had taken of the fire scene (copies of such photographs had been

provided in 1982); and the remaining interrogatories were answered. The deposition transcript, photographs and answers to interrogatories were all received by appellants' counsel prior to the September 23rd hearing.

Again, however, appellants chose not to submit any expert declarations in opposition to the motion. They relied solely on another declaration of attorney Cain, and a two-page declaration of Isabel Cannedy. Cain's declaration was confined to discovery matters and portions of his notes of the second Bachtelle deposition. Mrs. Cannedy declared that when she returned to the mobile home, "most of the flames that I could see inside my home appeared to be in the Northwest corner in the area of the dining room; the far end of the structure away from the location of the furnace." This statement, which does not address the cause of the fire or the alleged defects in

respondent's electrical system, cannot be considered an adequate rebuttal to respondent's experts.

Following the hearing on September 23, 1987, appellants' request for a further continuance was denied and the trial court entered an order granting the motion. Since appellants failed to controvert respondent's evidence prior to the ruling on the motion for summary adjudication, we hold that the motion was properly granted.

Appellants then filed a motion for reconsideration dated October 16, 1987. The motion was supported by two expert declarations. Ron Hall, a fire cause consultant with substantial experience investigating the origins of fires, stated that he had been retained by appellants in 1982. He opined that "the most probable cause of the fire was electrical in nature." He reached his conclusions by a process of eliminating other potential

causes. In eliminating the furnace as a potential cause Hall relied almost exclusively on the advised of P. A. Smith and Associates, who he said were experts on "the involvement of liquid petroleum and natural gas appliance in a fire situation." Graham Allan Jones, an electrical engineer, declared that his review of respondent's records and other investigations indicated that "the service distribution substation, lines and transformer were not sources of voltage irregularity to the Cannedy resident." He noted, however, that the service conductors providing electricity to the mobile home had apparently been cut and removed at the time of the fire. Without examining the service conductors, Jones stated that it was not "possible to guarantee" the absence of a defect, voltage imbalance or overvoltage in the mobile home's electrical system.

The motion for reconsideration was

heard on October 27, 1987. Although the order prepared by respondent and filed after the hearing states that the motion was denied, it is evident from the reporter's transcript that reconsideration was granted but the ruling on the motion for summary adjudication was reaffirmed. When the matter came on for trial in November of 1987, it appeared that appellants had no viable claim in light of the granting of the motion for summary adjudication and the case was dismissed. The motion for summary adjudication thus turned out to be the equivalent of a motion for summary judgment.

Appellants do not contest the dismissal; they complain only of the earlier rulings on the motions for summary adjudication and reconsideration. As a consequence, this case is in the posture of an appeal from a dismissal following the grant of summary judgment. Since we have

already determined that the motion for summary adjudication was properly granted, the only remaining question is whether a different ruling was compelled by the introduction of additional evidence in connection with the motion for reconsideration.

"We are not confined, in considering the granting of the summary judgment, to the sufficiency of the stated reasons. It is the validity of the ruling which is reviewable and not the reasons therefor." (Barnett v. Delta Lines, Inc. (1982) 137 Cal App 3d 674, 682.) Thus, although the trial court evidently considered appellants' belated expert evidence, we are not compelled to do so. In our view, appellants have provided no satisfactory explanation why they could not have submitted the declarations of their experts prior to the ruling on summary adjudication. It appears to us that their

counsel simply chose to gamble that they could defeat the motion for summary adjudication without having to disclose their experts. The requisite showing was not attempted until the wager had been lost. Under these circumstances, it would not have been an abuse of discretion to deny the motion for reconsideration. Appellants are therefore bound by the result herein, which is the same result that would have followed if reconsideration had been denied.

Section 1008, subdivision (a) requires that a losing party's motion for reconsideration be "based upon an alleged different state of facts." This language was construed in Blue Mountain Development Co. v. Carville (1982) 132 Cal App 3d 1005, 1012-1013 as follows: "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the

facts. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rules of res judicata." [Citations.] When the requirement of section 1008 that the application for reconsideration be upon an 'alleged different state of facts' is viewed in light of this public policy, it is evident that the party seeking reconsideration must provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time. In short, the moving party's burden is the same as that of a party seeking new trial on the ground of 'newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.'" (Emphasis supplied.)

Appellants' only explanation for withholding their expert declarations is that discovery was not completed. As previously noted, however, all of the outstanding items was furnished to appellants' counsel prior to the September 23, 1987, hearing on the respondent's motion. The transcript of Bachtelle's deposition was provided on September 14, 1987, Bachtelle's color photographs on September 17, and the answers to interrogatories on September 21. Although appellants assert that the time for briefing had passed by the time this information was received, there is no indication that they sought leave for supplemental briefing prior to the hearing or, more importantly, that any of the information was crucial to their experts' opinions. The record does not establish how the opinions of Hall and Jones were influenced by respondent's answers to the

remaining interrogatories (evidently, appellants' third or fourth set). Since appellants' counsel did not seek to obtain an expedited transcript of Bachtelle's second deposition, the lack of that transcript is an inadequate excuse even if, as is by no means clear, Bachtelle's additional testimony was vital to appellants' case. Similarly, it is unclear why, if copies of Bachtelle's photographs were inadequate, appellants waited years to request the originals.

Appellants had more than ample time to develop their case before the motion for summary adjudication was heard. In the course of four and one-half years, 15 depositions were taken, and respondent answered 228 interrogatories and 57 requests for production of documents. If appellants were not ready to contest respondent's motion in September of 1987, less than two months prior to trial, then

they did not proceed with the "reasonable diligence" required to obtain reconsideration of the ruling that led to dismissal of their case. Inadequate discovery is an "unsatisfactory" explanation. As respondent pointed out to the trial court: "PG&E has allowed the plaintiffs to fully depose two if its expert consultants and examine their entire files, although there has been no expert disclosure under Code of Civil Procedure section 2034. By contrast, the plaintiffs have not revealed who their experts are, or made their testimony and files available to PG&E. The only 'advantage' in discovery in this case has gone to the plaintiffs, who have been give the opportunity to obtain preference in discovery of PG&E's expert consultants."

In electing to proceed without expert declarations, appellants' decision was analogous to the decision of the attorney

in Corns v. Miller (1986) 181 Cal App 3d 195, not to appear at a hearing on a motion for entry of default against his client and request for sanctions. The attorney sought reconsideration after the motion was granted, declaring that he did not appear because he "assumed that the court would not award sanctions." (Id. at p. 199.) Noting that hits "assumption was not warranted and was not one with which a reasonable attorney should have been comfortable," the court upheld denial of the motion for reconsideration. (Id. at p. 202.) "[T]he facts which [the attorney] recited in his declaration in support of reconsideration were obviously known to him before the sanctions order was made...[t]he only thing newly discovered was the inaccuracy of [his] guess about what the court would rule." (Ibid.) Appellants' attorneys also guessed wrong, and their clients are saddled with the consequences.

We recognize the salutory policy of deciding cases on their merits. (See, e.g., Sprecher v. Adamson Companies (1981) 30 Cal 3d 358, 372.) Nevertheless, our crowded courts are not required to reopen issues previously decided to address matters that could have been raised in the first instance.

The judgment is affirmed.

(Cannedy et al. v. PG&E, AO41009)

Signed: Perley, J.

We Concur:

Signed: Anderson, P.J.

Signed: Poche, J.

# A P P E N D I X  B

[COPY]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, No. A041009
S009203

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

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ISABEL CANNEDY et al.

v.

PACIFIC GAS AND ELECTRIC COMPANY

PANELLI, J., DID NOT PARTICIPATE.

Appellants' petition for review DENIED.

Signed LUCAS
Chief Justice

# A P P E N D I X  C

[COPY]

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

| | |
|---|---|
| ISABEL CANNEDY, et al. | No. 803059 |
| Plaintiffs, | ORDER GRANTING JUDGMENT ON THE PLEADINGS AND DISMISSAL |
| vs. | |
| PACIFIC GAS & ELECTRIC COMPANY, et al., | |
| Defendants. | |

This action came on regularly for jury trial on November 18, 1987. The Plaintiffs were represented by their attorneys, Garrett Riegg and Gene Cain; the Defendant was represented by its attorney, David Fleisig. The Court having reviewed the

files and records in this matter, and having heard argument of counsel, made the following rulings:

1. Based on the summary adjudication granted PG&E on September 24, 1987, PG&E's motions in limine are granted.

2. Because the motions in limine, are in net effect, an objection to all evidence, a judgment on the pleadings is granted and PG&E's motion to dismiss is granted.

(Clemons vs. American Warranty Corp. (1987) 193 Cal App 3d 444, 451-452) (6 Witkin, California Procedure 3 Ed. Proceedings Without Trial, Section 273.)

3. Judgment is rendered for PG&E.

DATED: December 10, 1987

Signed: Raymond J. Arata, Jr.
Judge of the Superior Court

# A P P E N D I X  D

[COPY]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

Honorable Roy L. Wonder, Judge Presiding

Department No. 8

| | | |
|---|---|---|
| ISABEL CANNEDY, et al., | ) | No. 803059 |
| Plaintiffs, | ) | MINUTE ORDER |
| vs. | ) | |
| PACIFIC GAS AND ELECTRIC COMPANY, et al., | ) | |
| Defendants. | ) | |

The motion of defendant Pacific Gas and Electric Company for adjudication of issues is granted.

Defendant is to prepare the order.

Dated: September 24, 1987

Signed: Roy L. Wonder
Judge of the Superior Court